No. 80-1276

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD PATRICELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the court of appeals erred in refusing to hear an immediate appeal from an order of the district court denying his preindictment motion to unseal affidavits submitted by the government in support of a search warrant and to suppress as evidence and return to him certain property seized pursuant to the warrant.

1. On July 11, 1980, federal law enforcement officers, acting under authority of two federal warrants, searched petitioner's house, his car, and his person; they seized cocaine, materials for weighing and packaging drugs, gambling records and paraphernalia, approximately $3,000 in cash, and petitioner's 1980 Cadillac El Dorado. Petitioner was served with copies of the warrants and an inventory of the items seized, but he was not given the affidavits underlying the warrants, which had been sealed by the issuing magistrate. On July 18, 1980, petitioner moved to unseal the

affidavits and to suppress the seized items from use by the government and require their return (Pet. App. A10-A11).[1] The magistrate denied this motion (*id.* at A12).

Petitioner renewed his motion before the district court (Pet. App. A13-A15). The district court conducted a hearing on the motion (8/1/80 Tr. 3-29) and, based "[u]pon *de novo* consideration of the papers and arguments submitted by the parties, and upon in camera inspection of the affidavits submitted by the government in support of the issuance of the search warrants here involved" (*id.* at A16), the court sustained the magistrate's decision "to issue such search warrants and to seal the affidavits upon which their issuance was based" (*ibid.*).

Petitioner sought immediate appellate review. The court of appeals dismissed the appeal in an unpublished judgment order on the ground that the " 'essential character' of [petitioner's] motion[] was suppression of the seized items" and that the denial of such a motion is not subject to interlocutory review (Pet. App. A18).

2. Petitioner emphasizes (Pet. 4) that "[t]his petition presents a single issue * * * : the appealability of a district court order, keeping sealed indefinitely documents which furnished the basis for the seizure of petitioner's property when there is no criminal prosecution *in esse*." See also *id.* at 4 n.1, 8-9. However, he cites no authority for the proposition that such an order is immediately appealable. To the contrary, as here,[2] the confidentiality of the affidavit submitted in support of the search-warrant application may be imperative to the continuation and success of an ongoing criminal investigation, and a judicial order sealing the

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[1]Prior to that time, various items had voluntarily been returned to petitioner (Pet. App. A9), including his keys and driver's license (compare Pet. 3).

[2]See C.A. App. A23.

affidavit is merely a step in the overall criminal process. Cf. *United States* v. *Raddatz*, No. 79-8 (June 23, 1980), slip op. 11; *McCray* v. *Illinois*, 386 U.S. 300 (1967). If petitioner is indicted, he may then contest the validity of the warrant, including any restrictions placed on his access to the underlying affidavit. On the other hand, if the investigation is concluded and no charge is returned against petitioner, the district court may, upon appropriate motion,[3] reconsider the propriety of the sealing order in light of those subsequent developments.[4] Cf. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978); *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978). Accordingly, the right to an immediate appeal urged by petitioner would be inconsistent both with sound investigatory practice and with orderly proceedings in the district courts at this preliminary stage of the criminal process.

b. Petitioner also contends (Pet. 4-8) that his motion to "[s]uppress from use by the government and return to [him] all property seized pursuant to the warrants * * * to which the sealed affidavits pertain * * * " (Pet. App. A11) is immediately appealable.[5] As petitioner acknowledges (Pet. 7),

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[3]It is not at all clear that the sealing of the affidavit would, by itself, be of continuing significance in the event that petitioner is not indicted. Of course, insofar as petitioner pursues any civil remedies he may have in connection with the challenged search and seizure, the maintenance of the sealed affidavit can be considered in the context of that litigation (subject to the customary standards of appealability in civil actions).

[4]The grand-jury investigation of petitioner is still in progress at this time. We are advised by the Assistant United States Attorney in charge of the investigation that action on an indictment is expected within the next 30 days.

[5]Petitioner has not alleged that his property had been retained by the government without justification or for an excessive period, or that he has been irreparably harmed by such retention. Compare *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F. 2d 15, 17 (7th Cir. 1978) (independent equitable action solely for return of property based

however, recent decisions of the courts of appeals have uniformly taken the contrary view that an immediate appeal is unavailable under 28 U.S.C. 1291 where, as in this case, a grand-jury investigation is underway and "[t]he 'essential character' of [the defendant's] motion[] was suppression of the seized items" (Pet. App. A18).[6] See, *e.g.*, *Imperial Distributors, Inc.* v. *United States*, 617 F. 2d 892 (1st Cir.), cert. denied, No. 79-1967 (Oct. 6, 1980); *In re Grand Jury Proceedings (Appeal of FMC Corp.)*, 604 F. 2d 806 (3d Cir. 1979); *Consumer Credit Insurance Agency, Inc.* v. *United States*, 599 F. 2d 770, 772-773 n.2 (6th Cir. 1979), cert. denied, 445 U.S. 903 (1980); *Church of Scientology of California* v. *United States*, 591 F. 2d 533 (9th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *Application of the United States*, 427 F. 2d 1140, 1141 (5th Cir. 1970); *Parrish* v. *United States*, 376 F. 2d 601, 603 (4th Cir. 1967). See also *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962). These decisions rest on the fundamental Congressional policy, embodied in 28 U.S.C. 1291, generally to preclude interlocutory appeals as of right in order to avoid the attendant consequences of piecemeal review, delay, and congestion of trial and appellate dockets. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 5-6; *United States* v. *Nixon*, 418 U.S. 683, 690 (1974); *United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *DiBella* v. *United States*, *supra*, 369 U.S. at 124, 126; *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).[7]

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on unreasonable retention of seized items, where retention threatened irreparable injury and no indictment had been returned for more than 17 months after the seizure).

[6]With respect to the investigation of the grand jury, *United States* v. *Calandra*, 414 U.S. 338, 354 (1974), would seem to permit the use of the seized evidence regardless of the validity of the affidavit.

[7]Of course, as discussed above (see page 3, *supra*), "[i]f there is an indictment and conviction, the constitutionality of the search and seizure will be reviewed. If there is no indictment and the property is not

Without gainsaying the soundness of this principle, petitioner argues that there is a conflict in the circuits on the question of appealability. However, the three cases cited by petitioner do not demonstrate the need for the Court's review at this time.

In *Richey* v. *Smith*, 515 F. 2d 1239 (5th Cir. 1975), the district court dismissed for lack of jurisdiction a motion under Fed. R. Crim. P. 41(e) seeking the suppression of evidence and the return of property. The court of appeals held the lower court's dismissal to be appealable since "the order appealed from rested solely on jurisdictional grounds and was not a ruling on the merits of the motion as was the case in *DiBella*" (515 F. 2d at 1242-1243).[8] As made clear in its later decisions in *United States* v. *Glassman*, 533 F. 2d 262, 263 & n.3 (1976), and *Simons* v. *United States*, 592 F. 2d 251, 252, cert. denied, 444 U.S. 835 (1979), the Fifth Circuit follows the prevailing position that the denial of a Rule 41(e) motion on the merits is not appealable even if the movant has not been indicted at the time of the appeal.

In *United States* v. *Alexander*, 428 F. 2d 1169 (8th Cir. 1970), the district court refused to conduct an adversary hearing on a Rule 41(e) motion for the return and suppression of a large quantity of allegedly pornographic materials. The government did not challenge the authority of the Eighth Circuit to entertain the appeal (428 F. 2d at 1171 n.3), and accordingly the court reached the merits of the

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returned, [petitioner] can then move for its return." *Imperial Distributors, Inc.* v. *United States*, *supra*, 617 F. 2d at 896. See also Pet. App. A18.

[8]The court of appeals also noted that plaintiffs had "abandon[ed] * * * the motion for suppression * * * " (515 F. 2d at 1242) and that the litigation was "more properly considered simply as a suit in equity rather than one under the Rules of Criminal Procedure * * * [so that] return of the property would not necessarily entail suppression for the purposes of further court proceedings" (*id.* at 1245).

question whether an adversary hearing should have been held. In light of the First Amendment setting of the case (see, *e.g.*, *Walter* v. *United States*, No. 79-67 (June 20, 1980), slip op. 5 & n.6) and the government's concession of reviewability, we do not believe that *Alexander* presents a sufficient conflict to warrant review by this Court.

In *Gottone* v. *United States*, 345 F. 2d 165 (10th Cir.), cert. denied, 382 U.S. 901 (1965), the movant filed a pre-indictment proceeding under Fed. R. Crim. P. 41(e) to have seized property returned to him and suppressed from evidence. In affirming on the merits the district court's judgment rejecting this claim, the Tenth Circuit concluded that it had jurisdiction over the movant's appeal. In light of the cursory consideration given to the question, the absence of subsequent reference to the decision by the Tenth Circuit, and the later decisions of this Court and the other courts of appeals stressing the policy against piecemeal review and interference with the grand-jury process (see page 4, *supra*), there is a substantial question whether *Gottone* is of continuing vitality. Moreover, the conflict asserted by respondent to result from *Gottone* has long existed without causing any problems of judicial administration or difficulties in the criminal justice system. Thus, we do not believe that this Court's review is required at the present time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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